No. 56

UNITED STATES

Circuit Court of Appeals.

October Term, 1891.

EDWIN D. CARTER,

Plaintiff in Error,

vs.

CHARLES RUDDY, CHARLES ROBBINS, MICHAEL MCMURRAY, FREDERICK A. STEVENS, M. J. DONNELLY, C. M. PATTERSON, JOHN DOE, and RICHARD ROE,

Defendants in Error.

BRIEF OF PLAINTIFF IN ERROR.

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STATEMENT OF THE CASE.

This is an action brought by the plaintiff in error against the defendants to recover the possession of a parcel of land, described as a portion of the north half of Block 22, in the town of Wallace, Shoshone County, then Territory, now State of Idaho. The complaint is in the usual form, and charges the defendants with having on or about the 19th of February, 1889, unlawfully entered upon said parcel, and the withholding of the same from the plaintiff,

of all of which the plaintiff was alleged to have been the owner and seized thereof at the time of the alleged entry. The plaintiff prays judgment for the possession; for $10,000 for withholding the same from the plaintiff, and for $1,000, the value of the rents and profits. The complaint bears date April 7th, 1889. On the 24th of June, 1891, the defendants filed each his separate answer to the complaint, in which each claimed to own a separate and distinct parcel of the land claimed in the complaint, and each denied the ownership of the plaintiff to the parcel claimed by him. Each also sets up that he is a citizen of the United States, and a resident of Idaho Territory, and that at the date of the alleged unlawful entry, the lots claimed were situated in the town of Wallace, and were known as, and designated on the plat of said town, as lots Nos. in said Block 22. That they were public, vacant and unoccupied lands and that they were not owned or held by any person for any purpose whatever, and that being so vacant the parties entered and placed a written notice of location thereon, and enclosed the same and complied with all the laws and customs of the town of Wallace, and recorded the said notice in the office of the Town Recorder, and thereby became the owner, and is now in the peaceable possession thereof. Plaintiff's alleged damages are denied; the defences are substantially alike, and consist in substance of a denial of the plaintiff's claim to the land. The action, after the admission of the State into the Union was removed to the United States Circuit Court, for the District of Idaho, on the ground of there being a federal question involved, and also upon the ground of diverse citizenship of the parties. The principal question in the case aside from matters relating to the prior possession of the plaintiff, was as to certain rights claimed by the plaintiff, under a conveyance made by the grantee of the locator of certain Sioux Half-breed Scrip. After the location had been made and the certificate issued by the United States Land Office at Cœur d'Alene City, Idaho, it was discovered by the Commissioner of the General Land Office at Washington that this scrip had been duplicated by an order of the Commissioner some years before, and the duplicate scrip applied to some lands in Dakota, about 1880. The Commissioner in view of this cancelled the Cœur d'Alene

location under the original scrip, and thus it was claimed the deed of the location to the plaintiff was void, and on the news of this action reaching Wallace, the defendant's made their entry.

At the trial the Plaintiff contended that he was entitled to recover on two grounds:

First. He introduced proof of the location of the Sioux Half-breed Scrip, by one Walter Bourke, and the certificate of that location issued by the United States Land Officers at Cœur d'Alene City, Idaho (Folios 62 and 63, Transcript), and a deed (Exhibit "C," Folios 72 *et seq.*) the last paper bearing date October 18th, 1886. The scrip was located on this land on June 5th, 1886. The fact was also introduced; that he entered under that purchase, and of occupation afterwards.

Second. The plaintiff also introduced proof, that in October, 1886, under a contract made sometime prior, he took possession of the land, and in that and the two following years of 1887 and 1888 he had cleared up a heavy growth of timber, erected three houses on the block, two on the half block in dispute in this suit, and that these two buildings were occupied by tenants of his, paying rent at the time of the entry by the defendants. That he had built a sidewalk around the outer limits of the block, on nearly three of its four sides, brought water from a distance at considerable expense in pipes, and claimed that he had been in the actual, peaceable possession of the entire block from the date of his original purchase, at the time of the alleged unlawful entry by the defendants, and that as they were mere intruders entering without any title or color of title, his prior possession was sufficient to justify the recovery.

The defendants contended:

First. That the Sioux Half-breed Scrip location having been cancelled by the Department at Washington, conferred no rights on the plaintiff; and

Second. That the land being, as claimed by the defendants, public lands, that under an Act of the Legislature of Idaho, Section 4556 of the Revised Statutes of 1888, Territory of Idaho, the lots claimed by the defendants, being without buildings on them, and unenclosed, were open to their location.

There was much testimony in the case addressed to the question of the extent and value of the improvements made by the plaintiff, also some testimony on the question of the existence of a survey into lots at the date of Carter's purchase; the defendants endeavoring to limit the plaintiff's alleged possession to the lots on which he had erected the buildings.

All the testimony taken at the trial is in the Bill of Exceptions, and in the present record.

The plaintiff excepted to the admission of certain testimony on behalf of the defendants, also to the rejection of certain testimony offered on behalf of the plaintiff, and excepted to the refusal of the Court to give certain instructions asked for by the plaintiff, and to portions of the Charge of the Court, which were given to the jury on its own motion, all of which appears in this record.

The jury returned a verdict for the defendants.

On the coming in of the verdict plaintiff's counsel made a motion to the Court for a judgment, notwithstanding the verdict for plaintiff, which was overruled. The record does not show any exception to this ruling, and hence error is not assigned upon it.

The plaintiff made a motion for a new trial, but the same was overruled without argument, and judgment entered in accordance with the verdict of the jury.

The case presented here for review is upon the Bills of Exception found in the record, and the errors assigned to the action of the Court.

SPECIFICATION OF ERRORS.

The errors assigned are as follows:

The Court erred in rejecting the paper marked "Exhibit J" of plaintiff, being the notice addressed by the plaintiff E. D. Carter by his authorized agent G. I. Bell on the 27th day of February, 1889, to the defendants, Charles Ruddy and M. Murray which notice set forth the claim of the plaintiff to the property in dispute and that he claimed it by right of possession and by occupation and improvement.

2d. The Court erred in rejecting the testimony of the said Bell as to posting notice in the month of February, 1889, on the block of ground which this action is brought to recover, in which notice the plaintiff offered to prove that the said Carter claimed the ground in controversy, and notified parties of his claim thereto.

3d. The Court erred in permitting the defendants to introduce and read in testimony Exhibit No. 1 in the record being the petition of the plaintiff for the transfer of this case to the Circuit Court of the United States and the reasons therefor.

4th. The Court erred in admitting defendant's Exhibit No. 2, being the decision of the Commissioner of the General Land Office canceling the entry of Walter Bourke, being the Sioux Half-breed Scrip covering the land in controversy, the same being incompetent, immaterial and irrelevant.

6th. The Court erred in admitting in evidence the notice of R. E. McFarland, Register of the Land Office to W. R. Wallace, marked "Defendant's Exhibit No. 3."

7th. The Court erred in admitting in evidence the power of attorney from Walter Bourke to Mr. Wells marked "Defendant's Exhibit 4," by which said Wells is alleged to have made certain entries for other lands than those now in controversy.

8th. The Court erred in admitting in evidence copies of the original and duplicate scrip marked "Defendant's Exhibit No. 5" in record; and also erred in refusing to strike out the same for the reasons assigned in the record. It was incompetent, immaterial and irrelevant in this action.

9th. The Court erred in admitting in evidence the paper marked "Defendant's Exhibit No. 6" being copy of the patent issued to Walter Bourke founded on location made with Sioux Half-breed Scrip No. 430 C at Fargo, Dakota Territory R and R and the patent following the same.

10th. The Court erred in permitting to be received in evidence those certain papers connected with duplicate of like papers Sioux Half-breed Scrip No. 430 Letter C for 80 acres of land, and marked as "Defendant's Exhibit No. 7" in this record.

11th. The Court erred in admitting in evidence the two maps showing the line of the railroad, the Northern Pacific Railroad it not appearing that the lands in controversy were railroad lands, and marked "Exhibit 8 and 9" in the record.

12th. The Court erred in admitting in evidence articles of incorporation of the Town of Wallace marked "Exhibit No. 10," and read in evidence to the jury.

13th. The Court erred in admitting the map marked "Defendant's Exhibit No. 13," said map having been made long after the purchase by plaintiff of the property in dispute and there being no evidence that he had any knowledge of its existence when purchased with reference to it at the time it was made.

14th. The Court erred in admitting in evidence the notice signed by Ruddy, marked "Exhibit 13" and dated the 19th of February, 1889, claiming lots 2 and 3 in Block 22 Shoshone County, Idaho. The same being immaterial, irrelevant and conferring no right upon the plaintiff.

15th. The Court erred in admitting in evidence Defendant's Exhibit 14, being notice of Murray to lots 6 and 8 in Block 22, the same being incompetent, immaterial and irrelevant.

16th. The Court erred in its charge to the jury which is found in words as follows:

"But I now instruct you that in an action like this "in the United States Courts such certificate issued by a "Land Office of an entry of land cannot be received as any "evidence of legal title and the deed referred to being based "upon such entry cannot be considered as evidence of a "legal title or of a title in fee, and as evidence of such title "you will entirely disregard them and that the only con- "sideration you may give to either said certificate or entry "or said deed is as evidence to explain plaintiff's original "entry upon the premises, to explain his claim to the "possession thereof and to show his good faith in the claim "he asserts."

The effect of said charge being to entirely destroy all right of the plaintiff accruing out of the location of the scrip, the certificate of entry from the United States authorities thereunder, and his Warranty Deed under which he took possession of the land, and was therefore erroneous.

17th. The Court erred in that part of its charge to the jury, which is in following words:

"The defendants do not show or claim any title in fee "to the premises" and before the words "it follows said "part so excepted to," and the plaintiff having failed to show any.

Because the evidence shows that the plaintiff entered under a Warranty Deed based upon the regular certificate of purchase from the government of the United States and had *prima facie* a title in form, and his possession was based thereon.

18th. The Court erred in that portion of the Charge which is in the following words:

"It appearing therefore that the title to the premises "was at the time referred to in this action and appears still "to be in the government of the United States."

Because it appeared from the testimony that the land had been purchased under the Sioux Half-breed Scrip, and that the title had been conveyed by a Warranty Deed from the grantee of the government, to the plaintiff in this action.

19th. The Court erred in the following portion of its charge:

"But if on the contrary it was cut up into separate and "distinct lots and so marked upon the ground and was held "and treated as distinct tracts, then he must show the "possession of all thereof."

Because the testimony does not show that this state of facts existed, and it does appear from the testimony that at the time of Carter's purchase it had not been cut up into separate and distinct lots, and was not so marked upon the ground, and was not held and treated as separate and distinct tracts, but was held by Carter as a single parcel of ground.

20th. The Court erred in that portion of its charge which is in words as follows:

"It is a part of the policy of the Government to require "as a condition to the alienation of its lots that they shall "be improved and occupied for some beneficial purpose, "and while it does not declare the use to which they shall "be devoted, it does not design that citizens shall hold its "land by simply possessory title without improvement or in "an uncultivated state for speculation, but where such lands "are held, the holder must show by his acts it is for some "useful purpose and with a view of developing and improv- "ing it; if it is for a mining claim he must work it; if a "pre-emption claim he must improve it; if a timber claim

"he must plant it; and if a desert entry he must water it, "and in the case of any kind of property the government "requires that such reasonable improvements shall be made "as will fit it for the use to which it was to be adapted, and "show the good faith of the claimant; but it does not "require a hardship, or that such improvements shall be of "such a character or made in such time as to make his "possession onerous or burdensome."

Said instruction being misleading, calculated to prejudice the jury, and being erroneous as matter of law, and having no application to the circumstances of this case.

21st. The Court erred in that portion of its charge which is in words as follows:

"I will ask you now in taking the case that you will "disregard anything but the real rights of these parties. "Much has been said here about the good or bad faith with "which these parties have entered and the position and "standing of the plaintiff and perhaps some things have been "said that might tend to prejudice you. I want to say to "you that you are in the position of a Court; it is your "duty to disregard everything that tends to prejudice your "judgment in the least and to listen only or to take only "under your consideration the law applicable to the case "and the evidence to determine between these two parties "according to the law and the evidence that has been "placed before you."

Said instruction being misleading, as leaving the jury to infer that the right of the plaintiff was determined upon some other rule than the prior possession and the ownership of the property under the conveyance which has been made to him.

22d. The Court erred in refusing to give to the jury the first instruction asked for by plaintiff which was in words as follows:

"The plaintiff has introduced evidence showing that "prior to the entry of defendants, upon the north half of "block 22, the plaintiff had erected two houses on the said

"north half of said block, and at the time of the entry of "the defendants the plaintiff was in the actual possession "of at least one of these houses by his tenant, and such "possession is the actual possession of all the said north "half of said block.22 and your verdict must be for the "plaintiff."

23d. The Court erred in refusing to give the 2d instruction asked for by the plaintiff, which was in words as follows:

"The jury are instructed that if they believe that plain- "tiff had erected two houses on the north half of block 22, "prior to the entry of the defendants, and at the time of "such entry by defendants was in the actual occupancy "of either of said houses, by himself or his tenants, then "the plaintiff is entitled to recover."

24th. The Court erred in refusing to give to the jury the 3d instruction asked for plaintiff, which was in words as follows:

"In determining the question of whether the plaintiff "had possession of the premises in controversy at the time "of the entry of the defendants, I instruct you that it is "not necessary that the land be enclosed with a fence, or "that the plaintiff actually reside upon it, or that he "remain constantly upon the land, or even that he keep an "agent or tenant constantly upon the land, and if you find "from the evidence that the plaintiff entered upon the north "half of block 22, in the town of Wallace, which includes "the premises in controversy, claiming the whole thereof, "and that the boundaries thereof were distinctly marked "upon the ground, and were well known, and that he exer- "cised acts of ownership over the same by clearing off the "timber, and by the construction of two houses thereon, "and by building sidewalks, and that the same were done "for the purpose of improving the same, and that he paid "the taxes thereon, and that these acts of plaintiff were "open and notorious; then I instruct you that said acts "would constitute possession by the plaintiff of the whole "of the north half of the block."

"And I further instruct you that such possession of the "plaintiff would give him (plaintiff) title upon which he "may recover against the defendants."

25th. The Court erred in refusing to give to the jury the 4th instruction asked for plaintiff, which was in words as follows:

"If the jury find from the evidence that the plaintiff "was in the possession of the premises in controversy "within the meaning of the term, as I have defined them, "at the time prior to the entry of the defendants; then I "instruct you that such possession is presumed to continue "until entry thereon by the defendants, and the burden is "upon the defendants to show that plaintiff had abandoned "his possession to the ground in controversy at the time "they entered, and in determining the question of abandon-"ment you may consider the payment of taxes on the land "by plaintiff as well as all his other acts relating to the "premises."

26th. The Court erred in refusing to give to the jury the 5th instruction asked for by plaintiff, which was in words as follows:

"In determining the question of whether the plaintiff "entered into possession of the north half of the block 22, "the jury are to consider the deed given in evidence as well "the subsequent payment of the taxes upon the land by the "plaintiff."

27th. The Court erred in refusing to give to the jury the 6th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that in determining the ques-"tion of whether the plaintiff was in possession of the "premises in controversy at the time of the entry of the "defendants, it is not necessary that the plaintiff should "have been an inhabitant or actual resident of the town of "Wallace, or that he actually resided upon the premises in "controversy or any part thereof or that the premises be

"enclosed with a fence, or that there should be a building "upon any of the lots in controversy."

28th. The Court erred in refusing to give to the jury the 7th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that if the plaintiff entered "upon the premises in controversy under a deed from "Walter Bourke, introduced in evidence, claiming title all "of block 22 in good faith under said deed, and erected "buildings or made other improvements, upon a portion of "said block, and that the said premises were not in the "adverse possession of any one at the time he so entered, "and that under said claim of ownership under said deed "he cleared the whole or a portion of said block; then I "instruct you that his possession of a part of the premises "described in said deed would be a possession of the whole "block including the ground in controversy. And if you "find that the plaintiff did not subsequently abandon said "premises, but still continued to claim the same, and exer- "cised acts of dominion and control over the same, claiming "under said deed; then I instruct you that the defendant "could not obtain any right in the premises by an entry "thereon. That such possession of the plaintiff would "give him the title to the premises as against the de- "fendant."

29th. The Court erred in its refusal to give to the jury the 8th instruction asked for by plaintiff, which was in words as follows:

"Possession may be evidenced in several ways,— "First. By an actual residence upon the property, or by "an enclosure or by making improvements thereon, or "by cultivating the same, or by any other acts that are "open and notorious that shows that he exercises a "dominion and control over the same; and that among "such acts may be enumerated the cutting of timber and "clearing of land, and the payment of taxes thereon."

30th. The Court erred in refusing to give to the jury

the 9th instruction asked for by plaintiff, which was in words as follows:

"If you believe from the evidence that the plaintiff "entered upon and took possession of block 22 in the town "of Wallace, under and by virtue of a deed from Walter "Bourke, introduced in evidence; that he immediately went "upon occupied and improved and continued to occupy the "said block of land and asserted his claim and possession "to the whole of said block under said deed and no other "person was in adverse possession of any portion thereof "up to the time when the defendants entered thereon, and "never abandoned the same, and that the premises in con- "troversy in this suit are within the boundaries of said "block 22,—you will find for the plaintiff."

31st. The Court erred in refusing to give the 10th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that a fence, building or other "improvement is not essential to plaintiff's right to recover, "if plaintiff shows acts of ownership under claim of right "visible and notorious. Such acts are sufficient to authorize "the jury to find such possession."

32d. The Court erred in its refusal to give the 11th instruction asked for by plaintiff, which was in words as follows:

"The jury are instructed that the uninterrupted pay- "ment of taxes on the land is powerful evidence of a claim "of right to it."

33d. The Court erred in its refusal to give to the jury the 12th instruction asked for by plaintiff. which was in the following words:

"The jury are instructed that neither actual occupation, "cultivation or residence are necessary to constitute actual "possession."

34th. The Court erred in its refusal to give the 13th instruction asked for by plaintiff, which was in the following words:

"Mere possession is a good title against a stranger "having no title, a mere intruder cannot enter upon a "person seized, eject him, and when sued question on his "title or set up any outstanding title in another. The "prior peaceable possession of the plaintiff is enough to "enable him to recover in ejectment against one having no "title."

ARGUMENT.

The first error of which we complain is the ruling of the Court rejecting the paper marked Exhibit "J" (Folios 142 and 143, Transcript), it being the notice addressed by the agent of the plaintiff to the defendants Ruddy and McMurray, respectively, to vacate the premises in dispute and asserting the plaintiff's ownership to the same.

To understand the importance of this ruling, it will be necessary to state the facts surrounding the offer of this paper. The testimony in the record shows that the premises in question were a part of a tract of 80 acres of land which had been located by one Walter Bourke, by his agent, William R. Wallace, of certain Sioux Half-breed Scrip at the United States Land Office at Cœur d'Alene, Idaho, and that a conveyance purporting to convey title in fee had been made by said Bourke, through his said agent, to the plaintiff, in 1886 (see Exhibit "A," Folios 62 and 63; also Exhibit "B," Folios 68, 69 and 70; also Exhibit "C," Folios 72, 73, 74 and 75 of the Transcript). For the evidence following these Exhibits see Transcript, Folios 77, 78, 79, 80, 81, 82 and 83. This testimony had not only shown the execution and delivery of the deed, but the occupation and improvement of the land, the clearing of it, the erection of the buildings, and the regular payment of the taxes assessed by law (Folios 81 and 82). The entry of the de-

fendants was in February, 1889, while the taxes for the year 1888 had been paid by the plaintiff only in December prior.

The party had been shown by this proof to have entered under an apparent perfect title, showed improvements on the property to a large amount; regularly paid the taxes assessed, and so in possession of a part of the parcel, was thus debarred the privilege of showing that, at the time of the alleged unlawful entry of the defendants, he had promptly asserted his title and warned the trespassers of the unlawful character of their intrusion. If this proof were not admissible for any other purpose it certainly had the tendency to show that the plaintiff's claim had not been abandoned. By no rule of evidence that would permit the admission of Exhibits "F" and "G" (Folios 81 and 82), could this notice to defendants be excluded.

The next error of which we complain is the admission by the Court, over the plaintiff's objection, of the defendant's Exhibit No. 1, being the petition of the plaintiff for the transfer of this case from the State Court to the United States Court of the District of Idaho. We insist that this was an error which worked the plaintiff serious injury. The purpose of its introduction was to show that the plaintiff was a citizen of Wisconsin, and therefore not a resident of Idaho. The jury could only understand from the admission of such testimony, that if it appeared that Carter's residence was in Wisconsin, he could not hold lands by possessory title in Idaho. It is needless to say that such is not the law, and the admission of this evidence could only be pertinent or proper on the assumption that such was the law; that it was irrelevant and incompetent, and tended to injure the plaintiff's case before the jury, cannot, we think, admit of doubt. The petition was addressed to and intended solely to advise the Court on the question involving its jurisdiction of the case. A citizen of Wisconsin may reside in Idaho without affecting his citizenship in Wisconsin, and that fact had no pertinency to the issue on trial in this case, in any event. Its admission, we respectfully submit, was error prejudicial to the plaintiff.

We come now to the 3d, 4th, 5th, 6th, 7th, 8th, 9th, and 10th assignments of error, which may all properly be classed as one and form a group to which a single argument may apply, and are vital in effect on this case. They are based upon errors assigned upon the admission of testimony, which was objected to, on the ground of its being incompetent and immaterial. To point these exceptions we make the following statement of facts which the record will bear out. That on the 5th day of June, 1886, a location of Sioux Half-breed Scrip, Certificate No. 430 C, issued by the United States, was made of 80 acres of land, of which the land in dispute was a part, and the receipt issued by the proper land officers at Cœur d'Alene City, Idaho, to the locator of the same. Subsequently the plaintiff Carter purchased the land in dispute, by Warranty Deed, from the holder of this receipt, with no notice of any defects, it appearing to be perfect on its face. That he went into the quiet and peaceable possession of the land under that Deed, and held and improved it for nearly three years, paying the taxes, and exercising unquestioned dominion over it. In February, 1889, defendants entered upon the land, and refusing to vacate, we brought this action to recover the possession. That the Government of the United States had issued its receipt showing the location of this land, and that the plaintiff had a Warranty Deed from the purchaser is not denied, and fully established. We had an apparent perfect legal title, saying nothing of our possession, before the entry of the defendants. The defendants claim simply as squatters; they do not pretend to have made an entry under any color of title, they went upon the land and occupied it; that had been conveyed by Deed, and held and occupied thereunder by plaintiff for years before. The evidence to which we objected was presented for the purpose of impeaching this title. The question involved by the introduction of this testimony was elaborately discussed in *Walsh v. Hill*, 38 Cal., 482, as it had been indirectly and incidentally, in many previous cases in that State. The plaintiff in the case claimed under a Deed from one Crowell. He had entered under that Deed and the defendants claimed that the grantor of Crowell had no title. The Court in that case states the propositions for the defendant thus:

"*First.* That Crowell had neither title nor actual "possession at the time he sold to the plaintiff's grantors.

"*Second.* That the plaintiff's grantees never entered "under the deed into the actual possession of any part of the "land, claiming the whole."

The Court proceeds to answer these defences as follows:

"The fact that Crowell, the plaintiff's grantor had "neither title nor actual possession puts the case within "instead of without the rule; it is the want of title, "and actual possession of the grantor, that renders the "rule necessary to the grantee. If the grantor has title, "there can be no question between his grantee and a "subsequent intruder, either as to actual or constructive "possession; and if he has actual possession, and his "grantee succeeds to it, there can be no question between "the holder and the intruder as to the constructive posses-"sion."

And the Court then proceeds to amplify upon the doctrine, and says that this question had been settled by such a series of adjudications in the State of California, that it was regarded as no longer open to debate. (See citations in the opinion.)

It was utterly immaterial, even if it were true, that the title of the plaintiff's grantor were worthless, he was entitled to be protected all the more under the Deed, against those who came without any pretense of title. The Court below, in this case, instead of affirming our title, distinctly told the jury, as the instructions show, that the plaintiff "Had no title." It not only admitted this illegal and immaterial testimony, which was the subject of the exceptions we are now presenting, going to impeach the plaintiff's title, but gave it effect by treating it as having overthrown the plaintiff's evidence of title. The Court held that the Sioux Scrip title was void, not by reason of any defect appearing on its face, which would render it so, but by reason of extrinsic proof, which it permitted to be introduced for that purpose. It admitted the evidence that the

United States Land Department, after it had permitted the Scrip to be located on the land, and had issued the regular evidence of the location, which entitled the locator to a patent, or in fact gave itself, as we contend, a perfect title, had repudiated its action, and had cancelled the Scrip and the entry, after the plaintiff's deed was made, and he had gone into possession long before this action by the Department, it was as to him immaterial, and could not affect his right. The power of the Land Office to affect the rights of the plaintiff by its action was exhausted when it accepted the Scrip and approved its location, the title of the government to the land embraced in it passed, and the Deed of the grantee of the United States was not open to any attack that could affect his rights.

Smith v. Ewing, 11 Saw. Rep., 56.
Wilson v. Fine, 40 Fed. Rep., 52.

There could be no stronger illustration of the injustice of conceding the power of the Land Office to exercise authority to undo and revise its own action, than is furnished in the facts of this case. The reason given for cancelling the entry is that the locator of the Scrip had exhausted it by making a location of it, by a duplicate in Dakota. The facts were that the original and genuine Scrip was that which was laid on the lands, which were in part conveyed to plaintiff. That the person with whom this Scrip had been deposited had died, and some persons knowing of its existence, made such a showing to the Department, that it ordered other Scrip to be issued, under assumption that the original was either lost or destroyed; and because these parties had succeeded in procuring this *pretended duplicate Scrip*, on what was clearly a fraudulent showing, involving perjury, false personation and all that, it undertook to make the real *bona fide* holder of the original Scrip title suffer for its own improper action. The false and bogus Scrip was permitted to defeat an honest location made under the original certificate. We attack this action of the Department as without authority and void, and we attack the rulings of the Court in not excluding all evidence of it. In the first place there is no

pretense that there is any statute giving the Deaprtment any right whatever to issue other Scrip in case the original is lost. The impolicy of allowing such an authority to be vested in the Department, as that which it undertook to exercise, will be apparent in looking through the evidence to which we objected.

The original scrip was left with one Lambert by Bourke, the Scripee, in 1860. One Smith gave notice to the Department that he intended to lay this scrip on a certain tract of land in Dakota, but it seems this was not done, and the scrip was withdrawn, if it was ever presented. From that time forward, except that one Wilson makes affidavit that he saw the Scrip in the hands of Bourke's custodian, Lambert, there is no testimony whatever as to this Scrip's whereabouts. Lambert died in 1863. On October 26th, 1870, one Henry T. Wells, claiming to be an Attorney in Fact of Walter Bourke, applied to the Indian Department for a re-issue of this Scrip on the assertion that the original had been lost. After a vain effort to get the Department to order the issue without any affidavit by himself, Mr. Wells finally made an affidavit that he was the Attorney of said Bourke, and that said scrip had been lost, or rather that he had not been able to find it. It also appears that a protest was filed by Bourke in the Department at Washington against the recognition of the said Wells as his Attorney, and stating that said pretense in that behalf was false. Mr. J. L. Otis now occupying a high judicial position in Minnesota, and a man of the best professional character, filed that protest, and this shows that at the time the application was made, as soon as it came to Bourke's notice, Wells' pretenses were repudiated by him (see Transcript, Folio 183). It is unnecessary to indicate how Wells may have procured the form of a power of Attorney to himself, such as he insisted he held. That it involved perjury and forgery would not debar some persons from the effort, but in this case, the scripee, Bourke, was then living and protested against any such issue of Scrip to Wells, and yet without any proof that the original Scrip had been actually lost or destroyed, and simply on the assertion that the man with whom it was left had died, and that the pretended Attorney, Wells, could not find the Scrip, the

Department directed duplicate Scrip issued to him. The showing for the exercise of the power was ridiculous, even if the absolute owner of the Scrip had asked for it, but to issue it to Wells against Bourke's protest on the showing it did, only falls short of gross, culpable carelessness, or downright corruption. This only, however, in criticism of the manner in which this unseemly thing was done. As to the power, it is not pretended that the Department is authorized by any statute or other direct authority to issue other Scrip of this character in place of the original, and we take occasion here to challenge its power emphatically. The original is issued under the law of 1854; the power of the Department was then exhausted, and any pretended exercise of authority to re-issue it on a new condition of facts, not prescribed by law, is totally unauthorized and null. (See Sections 2441 and 2442 Revised Statutes, United States, providing for issuance of Bounty Land Warrants Scrip upon proof of loss; also 18 Statutes at Large, Chap. 330, page 311, applying to Agricultural College Scrip.) The effect of its exercise in this instance is to nullify the real Scrip, and give effect to that which is bogus. The original Scrip had not been lost; it had not been mislaid; Wells did not represent the said Bourke, and yet effect is given to a counterfeit, and an honest location is cancelled and rendered ineffectual by this extraordinary, inexplicable, and unauthorized action of the Department. We say its action was illegal and null in any event, and even if it had the power to issue the duplicate, the attempt to nullify the rights of those who acquired title by the location of the genuine Scrip was beyond its power. The Department cannot deprive the owner of the genuine Scrip of the benefit it confers or deprive him of its rights, or his grantees, without notice because it has committed a blunder; thus imposing upon the innocent, the penalty due to its own mistakes.

If, as we have already claimed, the Deed of Bourke and the entry under it, fixed the plaintiff's rights, as the authorities cited we think show, then all this testimony was improperly allowed to go to the jury, and the rulings of the Court directing it to be introduced, and giving it effect by the instructions were but a repetition of the error.

In Copp's Public Land Laws, (1890, Vol. II, pages 1006 and 1007) Secretary Vilas distinctly denies the authority to be in the law to re-issue such Scrip, or the propriety of its exercise, if the Department had the power, and refused an application like the present one, for the re-issue of Scrip.

The exception, numbered 11, to the admission of the map as to the fact that these lands were within the grant of the Northern Pacific Railroad, is perfect. How mere intruders into the premises held by Deed, could profit by the fact which this was intended to show, is not easily understood. It showed, perhaps, that they had no title, but it was certainly no defense to their disturbance of the rights of the plaintiff, which only tended to cloud the minds of the jury as to the plaintiff's title, and was injurious though immaterial.

Wilson v. Fine, 38 Fed. Rep., 789.

The same remark applies to the 12th exception of the ruling of the Court admitting in evidence the articles of incorporation of the town of Wallace, Exhibit 10 of the defendants, folio , Transcript. The fact that third parties undertook to organize a town corporation on the plaintiff's land could have no effect on his rights.

Doll v. Meador, 16 Cal., 321, 322 and 323.

The defendants being mere intruders were in no position to challenge the plaintiff's title.

Christy v. Scott, 14 How., U. S. Rep.
Whitney v. Wright, 13 Wend., 179.

The exception to the ruling of the Court below, in permitting the defendants to give in evidence to the jury their notice of location is based upon the fact that such ruling implied that such notice was some evidence of defendants' rights, when in fact a thousand such notices could avail them nothing—no law provides for such notices or give them any effect, and it was only misleading the jury with the notion that these papers were material and important. These exceptions are numbered 14 and 15. Nos. 16, 17 and 18 are exceptions to that part of the Court's instructions which are embraced in these words:

16th. The Court erred in its charge to the jury which is found in words as follows:

"But I now instruct you that in an action like this "in the United States Courts such certificate issued by a "Land Office of an entry of land cannot be received as any "evidence of legal title and the deed referred to being based "upon such entry cannot be considered as evidence of a "legal title or of a title in fee, and as evidence of such title "you will entirely disregard them and that the only con- "sideration you may give to either said certificate or entry "or said deed is as evidence to explain plaintiff's original "entry upon the premises, to explain his claim to the "possession thereof and to show his good faith in the claim "he asserts."

The effect of said charge being to entirely destroy all right of the plaintiff accruing out of the location of the scrip, the certificate of entry from the United States authorities thereunder, and his Warranty Deed under which he took possession of the land, and was therefore erroneous.

17th. The Court erred in that part of its charge to the jury, which is in following words:

"The defendants do not show or claim any title in fee "to the premises" and before the words "it follows said "part so excepted to," and the plaintiff having failed to show any.

Because the evidence shows that the plaintiff entered under a Warranty Deed based upon the regular certificate of purchase from the government of the United States and had *prima facie* a title in form, and his possession was based thereon.

18th. The Court erred in that portion of the Charge which is in the following words:

"It appearing therefore that the title to the premises "was at the time referred to in this action and appears still "to be in the government of the United States."

Because it appeared from the testimony that the land had been purchased under the Sioux Half-breed Scrip, and that the title had been conveyed by a Warranty Deed from the grantee of the government, to the plaintiff in this action.

These may be treated together. In the first place, we insist that by the location of the Sioux Half-breed Scrip Certificate, the title of the United States passed to the grantee. By a reference to the law providing for the issuance of the Scrip (Vol. X, Statutes at Large, 304), it will be seen that no patent is provided for, nor is one necessary to pass the title. The law provided for an exchange of lands, the United States agreeing to permit the holder of any certificate to locate it upon any of the lands specified in it, and upon his doing so, the transaction was complete.

"No certificate of purchase is to be issued—the Scrip "and application instead of certificates of purchase being "the instruments of title, which are to be returned to this "office in this class of business."

Circular Letter Secretary of Interior, May 28, 1878.

In almost all other cases the law provided for the issue of patents to persons who procured lands from the Government, even when the law operated as a present grant, but in this instance none was provided for. Whatever it may have been deemed wise to do in the way of making patents, certainly the law did not require it, and in looking at the

Statute we are forced to the conviction that the *location of the scrip* on the land was all that was contemplated by the law, to pass the title. The case of *Rutherford v. Green's Heirs*, 2 Wheaton, 193, and *Landreau v. Hanes*, 21 Wallace, 521, are examples of this class of title; patent was not necessary, title passed by location; besides, United States Land Scrip has always been treated as real and not personal property. (3 Opinions U. S. Attorney General, 382.) The ruling of Secretary Vilas, already referred to, shows that this must have been his view of the law, and we know of nothing contrary to it. The grantee had title to the land, in lieu of which this was given, and the issuance and location of the Scrip, on other lands, must necessarily have had the effect to place them, as to title, in their original position, When, therefore, the officers at Cœur d'Alene City received the Scrip of Walter Bourke's agent, and certified that he had located it on this land, he had a title to it, if the United States owned the land, when he made his location. or if he had only an equitable title to be perfected by the patent, his conveyance to the plaintiff, and his entry under that gave a title that is proof against all collateral attack. (See cases already cited.)

Whether, therefore, we rest the argument for the plaintiff on the doctrine that he entered under the Deed, or that his title by virtue of his grantor's purchase through the Scrip location, the ruling and instructions of which we complain are equally erroneous. The instructions in theory and in words repudiated the Scrip location and Deed to plaintiff as any evidence of title, and put the plaintiff's entire case, and right to recovery upon his ability to establish actual, exclusive, prior possession, existing at the date of the defendant's entry. While we insist that this proof was overwhelming and conclusive, yet the verdict shows how prejudicial these rulings of the Court were, and how easily a jury, eager to conciliate a mob of land jumpers, at the expense of a man who had the misfortune to appear to be in affluent circumstances, could be influenced to sacrifice the most sacred rights of property, in a special case. We do not propose to review, of course, the findings of this jury, that the plaintiff did not have the actual, open and undisputed possession of these premises at the date of the defendant's entry, but

we must say, in view of the testimony in the case, all of which is in this record, it is difficult to understand how the jury ever could have reached such a conclusion. The verdict itself is a gross violation of the law, as laid down by the Court, and we trust this Court will examine the testimony in the record on the question of the plaintiff's actual possession, if only to be informed how utterly unreliable a petit jury in a certain class of cases may become. Our client had in two-and-one-half years spent some $3,000 in improving less than two acres of land. Had dwellings on it that were occupied by his tenants; had brought water to it, nearly 2,000 feet distant; had a sidewalk surrounding nearly three sides of it, corner-posts at each of its corners; his ownership of it was as notorious as the existence of the town of Wallace, and yet the jury found that it was not in his actual possession. The receipts for taxes paid on it for the year 1888 were hardly dry, still the jury found it was not in his possession; a more absurd and shocking verdict under the evidence never sullied the records of any Court.

We have no doubt that if we had desired to press our motion, the Court below would have granted us a new trial, but as that would have involved a repetition of the errors to which we have already called attention, we preferred a formal overruling of that motion, and bring the case here in order that the law properly applicable to this case may be settled, and if it shall be done in accordance with the views which we have presented, and which we think are the law of this case, it will end the litigation, because the parties well understand the facts, For this reason we are especially desirous that these questions shall be determined, and have brought the case here in the hope that in passing upon the appeal we shall have such rulings as will prevent further contest in this action. If we are right in our claim that the location of the Scrip passed a title either legal or equitable, then these instructions are wrong, and if we are right that the plaintiff's title under the Deed from Bourke, was such that the defendants were not in any position to challenge it, then these instructions are wrong, and we respectfully insist that our positions on both are correct.

Again, we insist that the Court erred in that portion of its charge in which the jury were told, "That if on the "contrary it (the half block sued for) was cut up into "separate and distinct lots and was marked on the ground, "and were held and treated as distinct tracts, then he, the "plaintiff, must show the possession of all thereof." Bear in mind the state of the case as shown by the testimony. Carter testified that he had no knowledge of the block having been surveyed into lots; had never seen any stakes except at the corners of the block, and that he purchased and held the block as an entire parcel, and cleared and improved it as such, and it appeared that he had treated it as one parcel, and had never sold or disposed of a foot of it to any one; that there was a paper plat indicating lines of lots is probably true, but there is no proof of the existence of any monuments of these lines on the ground, and even Trask, the defendants' witness, didn't pretend that the lots were ever run out on the ground. He says that he set small stakes about an inch in diameter on the outside lines of the block, indicating the lots, the plat of which he introduced in his testimony. There was no testimony, therefore, to which such an instruction could possibly apply; all the testimony on that subject submitted by the defendants is found at folios 198, 199 and 200. We submit, the instruction had no basis of fact on which to rest; but the instruction is incorrect anyway.

Brobst v. Bruck, 10 Wallace, 519.

The 20th exception is to the following instruction given by the Court:

"It is a part of the policy of the Government to require "as a condition to the alienation of its lots that they shall "be improved and occupied for some beneficial purpose, "and while it does not declare the use to which they shall "be devoted it does not design that citizens shall hold its "land by simply possessory title without improvement or in "an uncultivated state for speculation, but where such lands

"are held, the holder must show by his acts it is for some "useful purpose and with a view of developing and improv- "ing it; if it is for a mining claim he must work it; if a "pre-emption claim he must improve it; if a timber claim "he must plant it; and if a desert entry he must water it, "and in the case of any kind of property the government "requires that such reasonable improvements shall be made "as will fit it for the use to which it was to be adapted, and "show the good faith of the claimant; but it does not "require a hardship, or that such improvements shall be of "such a character or made in such time as to make his "possession onerous or burdensome."

We insist that this instruction is erroneous as a matter of law; was not called for by the circumstances of the case, and was calculated to prejudice the jury in deciding it. What authority is there for saying that it is part of the policy of the Government to regard as a "Condition to the alienation of its lots" that they should be improved, and occupied for "some beneficial purpose." Then follows a dessertation on the mining law and other grants, upon condition, and the statement that the Government requires that such reasonable improvements shall be made, as will fit it to the use to which it was adapted, and show the "good faith" of the claimant. The Government, as a condition of a grant to a mining claim, or pre-emption claim. or timber claim, or desert entry, requires the claimant to do certain things, but in what law or statute does it require anything but the mere possession to enable the claimant to get title to a lot. "It does not require," says the Court, modifying its principal statement, "that such improvements "shall be onerous or burdensome, but they must show the "good faith of the claimant, and must not be held simply "for speculation." The entire theory of this part of the charge is in opposition to the law. If the purpose of claimants of town lots could be made the subject of inquiry, no one's title would be safe. If the holder should at some time in a loose conversation state, that he intended to sell his lot instead of building on it, the question of his "good faith" would arise and inquiry would ensue; that is entirely foreign to the law on the subject. The instruction mixes up things that are totally dissimilar; titles based on a

totally different tenure and is calculated to mislead, and must have misled the jury in their deliberations, if they gave it any effect. If any specified conditions were imposed by the law on the claimant of a lot, such as these instructions implied, then the Court should have stated what they were, so that the jury would be able to apply them to the facts, but the Court contents itself with the general statement that "conditions" were required, and dilates upon their importance, and leaves the case to the tender mercies of the jury without further advice. It leads the jury into a wilderness of speculation about what may be or may not be a "burdensome or onerous condition," and there abandons them.

The 21st exception to the following portion of the charge is the next error assigned:

"I will ask you now in taking the case that you will "disregard anything but the real rights of these parties. "Much has been said here about the real rights of these "parties. Much has been said here about the good or bad "faith with which these parties have entered and the position "and standing of the plaintiff and perhaps some things have "been said that might tend to prejudice you. I want to say to "you that you are in the position of a Court; it is your duty "to disregard anything that tends to prejudice your judg-"ment in the least and to listen only or take only under your "consideration the law applicable to the case and the evidence "—to determine between these two parties according to the "law and the evidence that has been placed before you."

This is a sort of general lecture to the jury as to their duty. In tone and spirit it is commendable, but when it stated to the jury, that it stood in the "position of a Court," it contains a vital error that we cannot submit to in silence. The jury is not in the position of a Court in the trial of any civil case, and they have no right to try any case between parties on any such theory. The instruction was easily construed by the jury in a way to enable them to decide it in their own view of what was "right and fair." This was a case which demanded that the Court should clearly lay down the law, and the jury be held to a com-

pliance with it, as given them. We earnestly contend that this abdication of its authority, and license to the jury by instructions, that induced them to believe they could manufacture the law for the case, was calculated to do us serious injury.

The errors assigned in the record, and numbered from the twenty-second to the twenty-fourth, belong to one category, and they may be treated together for brevity.

We asked the Court to instruct the jury as follows:

1. "The plaintiff has introduced evidence showing that "prior to the entry of defendants, upon the north half of "block 22, the plaintiff had erected two houses on the said "north half of said block, and that at the time of the entry "of the defendants the plaintiff was in the actual possession "of at least one of these houses, by his tenant, and such "possession is the actual possession of all the said north "half of said block 22, and your verdict must be for the "plaintiff."

2. "The jury are instructed that if they believe that "plaintiff had erected two houses on the north half of "block 22, prior to the entry of the defendants, and at the "time of such entry by defendants was in the actual occu-"pancy of either of said houses, by himself or his tenant "then the plaintiff is entitled to recover."

3. "In determining the question of whether the plain-"tiff had possession of the premises in controversy at the "time of the entry of the defendants, I instruct you that it "is not necessary that the land be enclosed with a fence, or "that the plaintiff actually reside upon it, or that he re-"main upon the land, or even that he keep an agent or "tenant constantly upon the land, and if you find from the "evidence that the plaintiff entered upon the north half of "block 22, in the town of Wallace which includes the "premises in controversy, claiming the whole thereof, "and that the boundaries thereof were distinctly marked "upon the ground, and were well known and that he exer-

"cised acts of ownership over the same, by clearing off the "timber, and by the construction of two houses thereon, "and by building sidewalks and that same were done for the "purpose of improving the same, and that he paid the "taxes thereon, and that these acts of plaintiff were open "and notorious; then I instruct you that such acts would "constitute possession by the plaintiff of the whole of the "north half of the block.

"And I further instruct you that such possession of the "plaintiff would give him, plaintiff, title, upon which he "may recover against the defendants."

4. "If the jury find from the evidence that the plain-"tiff was in the possession of the premises in controversy "within the meaning of the terms as I have defined them, at "a time prior to the entry of the defendants, then I instruct "you that such possession is presumed to continue until "entry thereon by the defendants, and the burden is upon "the defendants to show that plaintiff had abandoned his "possession of the ground in controversy at the time they "entered, and in determining the question of abandonment "you may consider the payment of taxes on the land by the "plaintiff as well as all his other acts relating to the "premises."

5. "In determining the question of whether the plain-"tiff entered into possession of the whole north half of the "block 22 the jury are to consider the deed given in evi-"dence as well as the subsequent payment of taxes upon "the land by the plaintiff."

6. "The jury are instructed that in determining the "question of whether the plaintiff was in possession of the "premises in controversy at the time of the entry by the "defendants, it is not necessary that the plaintiff should "have been an inhabitant or actual resident of the "town of Wallace, or that he actually resided upon the "premises in controversy or any part thereof, or that the "premises be enclosed with a fence or that there should be "a building upon any of the lots in controversy."

7. "The jury are instructed that if the plaintiff entered upon the premises in controversy under a deed from "Walter Bourke, introduced in evidence claiming title to "all of block 22, in good faith under said deed, and erected "buildings or made other improvements upon a portion of "said block, and that the said premises were not in the adverse possesion of any one at the time he so entered, and "that under his said claim of ownership under said deed he "cleared the whole or a portion of said block, then I "instruct you that his possession of a part of the premises "described in said deed would be a possession of the whole "block. including the ground in controversy. And if you "find that the plaintiff did not subsequently abandon said "premises, but still continued to claim the same and exercise acts of dominion and control over the same, claiming "under said deed, then I instruct you that the defendants "could not obtain any rights in the premises by an entry "thereon. That such possession of the plaintiff would "give him the title to the premises as against the defendants."

8. "Possession may be evidenced in several ways. "First. By an actual residence upon the property, or by "an enclosure or by making improvements thereon, or by "cultivating the same or by any other acts that are open "and notorious that show that he exercised a dominion and "control over the same, and that among such acts may be "enumerated the cutting of timber and clearing of the "land, and the payment of taxes thereon."

9. "If you believe from the evidence that the plaintiff "entered upon and took possession of block 22 in the town "of Wallace under and by virtue of the deed from Walter "Bourke, introduced in evidence; that he immediately went "upon, occupied and improved and continued to occupy the "said block of land, and asserted his claim and possession "to the whole of said block, under said deed and no other "person was in adverse possession of any portion thereof, "up to the time when the defendants entered thereon, and "never abandoned the same, and that the premises in controversy in this suit are within the boundaries of said "block 22, you will find for the plaintiff."

10. "The jury are instructed that a fence, building or "other improvement is not essential to plaintiff's right to "recover if plaintiff show acts of ownership under claim of "right, visible and notorious. Such acts are sufficient "to authorize the jury to find such possession."

11. "The jury are instructed that the uninterrupted "payment of taxes on the land is powerful evidence of a "claim of right to it."

12. "The jury are instructed that neither actual "occupation, cultivation or residence are necessary to con- "stitute actual possession."

13. "Mere possession is a good title against a stranger "having no title, a mere intruder cannot enter upon a "person seized, eject him, and when sued question on his "title or set up any outstanding title in another. The "prior peaceable possession of the plaintiff is enough to "enable him to recover in ejectment, against one having "no title."

These requests are based upon two theories of the case, which the evidence justified us in assuming to have been established, and either of which authorized a recovery by the plaintiff. Our claim to the possession began in 1886; whether it be referred to our purchase as evidenced by the deed, and occupation under it, or to its being prior to the entry of the defendants, and rested only in our occupation, was immaterial, and our right to recovery on these facts, if the law had been properly given and followed by the jury, cannot, it seems to us, be the subject of serious debate.

If, as we contend, the Bourke title taken by us in unquestioned good faith was perfect for all purposes of protection against the entry of these defendants, then we should have had instructions that the jury find for the plaintiff, and the refusal of the Court to render a judgment in our favor on the motion for the judgment notwithstanding the verdict was error. But if the doctrine of *Walsh v. Hill*, and the cases in support of it be the law, as we insist, then the instructions numbered 5, 7, and 9 were

improperly refused, and as nothing was given, that was equivalent to them, or recognized the doctrine that they contained, we have a right to insist on a reversal on that ground. We cite in support of these instructions the following cases:

Walsh v. Hill, 37 Cal., 481.
Burt v. Punjaub, 99 U. S., 180.
Hicks v. Colman, 25 Cal., 122.
Ellicott v. Pearl, 10 Pet. Rep., 441.

But independent of the proposition which is embraced in the foregoing instructions we insist that the law of prior possession alone, as expounded and contained in the instructions numbered 1, 2, 3, 4, 5, 6, 8, 10, 11, 12, and 13, to the Court were sound and should have been given. That one who has prior, actual possession may recover as against an intruder, who has no title, is fundamental law; it has the sanction of every Court, from the United States Supreme Court down to the pettiest tribunal in the land, which takes jurisdiction of actions involving the possession of real estate. It was applied in

McCurdy v. Potts, 2 Dallas, 98.
Christy v. Scott, 14 How. U. S.
Burt v. Punjaub, 99 U. S., 180.
Campbell v. Rankin, 99 U. S., 262.

And by such a multitude of cases in the inferior Federal and State Courts that citations are unnecessary.

Carter, the plaintiff, went into possession of block 22, of which the land in controversy was a part, when it was an unbroken forest, even the bear trap with which the locator of the Sioux Scrip trapped the bears of the mountains, was still on that block when he made the purchase. He erected a saw mill on an adjoining parcel, and built on another parcel a hotel, and opened a stock of merchandise, and the evidence shows was the pioneer business man of what has grown to be the town of Wallace. He commenced the herculean labor of

clearing off this particular block, and expended thousands of dollars improving it and erecting buildings upon it, which buildings were occupied by his tenants at the time when the land jumpers learned that the Land Department had rejected the Bourke entry upon which they supposed Carter's title rested, and then they entered upon all the portions of this block upon which Carter had not erected any buildings. That he had cleared it off, built sidewalks, laid out by metes and bounds known to all men, is just as certain as that it had become valuable by his labors and expenditures, and the development of the country. Only two months before he had paid the taxes assessed against it, and his receipts are in the record. A bolder or more lawless and audacious invasion of another's property has never disgraced a civilized community. For reckless audacity it can only be compared to robbery on the highway. The plaintiff paid $600 for this block when it was an unbroken forest, cleared it of its timber, erected dwellings upon it, paid the taxes, brought water upon it, and by every indication of ownership which could be required to show his dominion, asserted his claim and right to it, and yet men without any pretense of right or claim, who knew he had not abandoned it, or thought of such a course, go into its possession in the night time, and seek to maintain such acquired possession as rightful. If the law as it is, had been given to the jury in this case, no such finding as they returned could have been possibly had. We regard the verdict even under the instructions as given, as entirely unwarranted on any fair application of the evidence, but the jury were not, we think, so guided as to give us the benefit of the law as it is, properly applicable to this case, and we earnestly protest against allowing a judgment which has neither the law or the facts to sustain it, to stand.

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